90-1077

NO. 90- _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1990

MICHELLE STEPHENSON,

Petitioner,

v.

DEKALB COUNTY DEPARTMENT OF PUBLIC WELFARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

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QUESTION PRESENTED

1. Before a court may accept a mother's out of court signature to a "voluntary relinquishment" of her relationship with her children, and thereby permanently terminate that relationship, must it hold a hearing to determine whether the mother's act was, in fact, voluntary?

2. Should the proceeding during which the court accepted the "voluntary relinquishment" (again in the mother's absence) be reported, if a reporter was available?

Parties Involved

Michelle Stephenson is the natural mother of Michael Shane Stephenson, now aged 9, Benjamin Jeffery Gibson, now 7, and Christopher Charles Gibson, now 6. Michelle Stephenson was, during proceedings at the trial level, married to Mitchell Gibson, Michael's, Benjamin's and Christopher's natural father.

Both parents were respondents in a proceeding initiated by the DeKalb County Department of Public Welfare to terminate involuntarily their parental rights.

Michelle Stephenson appealed from the underlying judgment; her former husband did not. The parties to this petition, therefore, are Michelle Stephenson and the DeKalb County Department of Public Welfare.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MICHELLE STEPHENSON,)
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Petitioner,)
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v.)
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DEKALB COUNTY DEPARTMENT)
OF PUBLIC WELFARE,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

Michelle Stephenson prays that a writ of certiorari issue to review the judgment of the Indiana Court of Appeals.

Opinion Below

The Indiana Court of Appeals' decision in this case (App. D) is reported. In re M.S., 551 N.E.2d 881 (Ind.App.

1990).

Jurisdiction

The underlying judgment in this action was entered on October 4, 1988 in DeKalb County Circuit Court, acting as Juvenile Court, the Honorable Harold D. Stump presiding. Petitioner timely filed her motion to correct errors (App. A), then a condition precedent to an appeal pursuant to Indiana procedure, Ind. Tr.R. 59 (West 1988), and, on April 13, 1989, the motion was denied. (App. B).

Petitioner thereafter perfected her appeal to the Indiana Court of Appeals; on March 21, 1990 that court, one judge dissenting, affirmed the judgment. (App. D). Petitioner timely filed a petition for rehearing; that petition was denied, one judge dissenting, on June 5, 1990. (App. E).

Petitioner timely filed her petition to transfer to the Indiana Supreme Court, Ind.App.R. 11(B) (West 1990), on June 25, 1990. (App. F). That petition was denied on October 3, 1990. (App. G).

This petition is being filed within 90 days of the Indiana Supreme Court's denial of transfer. It is, therefore, timely under Rule 13.1 of the Rules of this Court since the Indiana Supreme Court's denial of transfer was "an order denying discretionary review" by " the state court of last resort."

This Court has jurisdiction pursuant to 42 U.S.C. Sec. 1257(a)(1988).

Constitutional and Statutory Provisions Involved.

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part,

> No State shall . . . deprive any person of . . . liberty without due process of law . . . .

2. Ind.Code 31-6-5-2 provided in 1988, Ind. P.L. 16-1983, Sec. 19,[1] in relevant part,

> (a) The county department . . . may sign and file a verified petition with the juvenile . . . court for the voluntary termination of the parent-child relationship if requested by the parents. . . . The petition shall be entitled "In the Matter of the Termination of the Parent-Child Relationship of _____, a child, and _____, his parent (or parents)" and must allege that:
>
> > (1) the parents are the child's natural or adoptive parents;
> >
> > (2) the parents, including the alleged or adjudicated father if the child was born out of

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1. This provision was amended in 1989 in ways having no bearing on this case. See, West's Ann. Ind.Code 31-6-5-2.

wedlock, knowingly and voluntarily consent to the termination of the parent-child relationship.

(3) termination is in the best interest of the child; and

(4) the petitioner has developed a satisfactory plan of care and treatment for the child.

(b) The parents shall be notified of the hearing in accord with IC 31-6-7-5.

(c) The parents must give their consent in open court unless the court makes findings of fact upon the record that:

(1) the parents gave their consent in writing before a person authorized by law to take acknowledgements;

(2) they were notified of their constitutional and other legal rights and of the consequences of their actions under section 3 of this chapter; and

(3) they failed to

appear.

Before the court may enter a termination order, it must inquire about the reasons for the parents' absence, and may require an investigation by a probation officer to determine whether there is any evidence of fraud or duress and to establish that the parents were competent to give their consent. The investigation must be entered on the record under oath by the person making it. If there is any competent evidence of probative value that fraud or duress was present when the written consent was given, or that a parent was incompetent, the court shall dismiss the petition or continue the proceeding. The court may issue any appropriate order for the care of the child pending the outcome of the case.

(d) Before consent may be given in court, the court must advise the parents of their constitutional and other legal rights and of the consequences of their actions under Section 3 of this chapter.

. . . .

3. Ind.Code 31-6-5-3 provided in

1988, Ind. Acts 1982. 183, Sec. 3,[2] in relevant part,

> For purposes of section 2 of this chapter, the parents must be advised that:
>
> (1) their consent is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress, or unless the parent is incompetent;
>
> (2) when the court terminates the parent-child relationship, all rights, powers, privileges, immunities, duties, and obligations (including any rights to custody, control, visitation or support) pertaining to that relationship are permanently terminated, and their consent to the child's adoption is not required;
>
> (3) they have a right to the care, custody, and control of their child as long as they fulfill their parental obligations;

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2. This provision was amended in 1990 in a manner having no impact on this case. See West's Ann. Ind.Code 31-6-5-3; Ind. P.L. 1-1990, Sec. 282.

(4) they have a right to a judicial determination of any alleged failure to fulfill their parental obligations in a proceeding to adjudicate their child a delinquent child or a child in need of services;

(5) they have a right to assistance in fulfilling their parental obligations after a court has determined that they are not doing so;

(6) proceedings to terminate the parent-child relationship against their will can be initiated only after:

(A) the child has been adjudicated a delinquent child or a child in need of services and the child has been removed from their custody following that adjudication; or

(B) a parent has been convicted and imprisoned for an offense listed in section 4.1(a) of this chapter, the child has been removed from that parent's custody under a dispositional decree, and the child has been removed from that parent's custody for six (6) months after a court

order;

(7) they are entitled to representation by counsel, provided by the state if necessary, throughout any proceedings to terminate the parent-child relationship against their will; and

(8) they will receive notice of the hearing at which the court will decide if their consent was voluntary, and that they may appear at the hearing and allege that it was not voluntary.

4. West's Ann. Ind.Code-31-6-7-5(a) provides,

> Service may be made upon any person under Rule 4.1 of the Indiana Rules of Trial Procedure. Personal service must be made at least three (3) days before the hearing to which the person is summoned. Service by mail must be sent at least ten (10) days before the hearing. However, service of summons is not required if the person entitled to be served attends the hearing.

Other statutes and rules bearing upon this petition are set forth in App. H.

Statement of the Case

On November 24, 1986, without benefit of counsel, Michelle Stephenson and her then husband Mitchell Gibson agreed in the DeKalb Circuit Court that their three children be made temporary wards of the DeKalb County Department of Public Welfare. (R. 25-26; see also, R. 20-21). Thereafter the Circuit Court reviewed the case in a series of proceedings on January 14, August 17, November 27, 1987 and April 4, 1988. (R. 28-38, 40-126, 133-72, 354-576, 578-642).[3]

Petition for Involuntary Termination

The DeKalb Department of Public Welfare ("the Department") filed a peti-

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3. None of the foregoing proceedings were reported. None of the records referred to above were received into evidence below. The parents were represented by counsel beginning with the November 27, 1987 proceeding.

tion to terminate the parents' relationship with their children pursuant to Ind. Code 31-6-5-4 (App. H, No. 1) on September 21, 1988. (R. 201). The hearing date was set for October 4, 1988. (R. 177). The Department filed a summons to the parents on September 23, 1988. (R. 178). It filed its confidential report with Judge Stump on October 3, 1988. (R. 202-63), the day before the hearing.

Michelle and her husband first met with their privately retained counsel to prepare for the October 4 hearing at his office on October 4, 1988, at 8:30 a.m. for approximately 10 minutes. (R. 680-81, 683-84; Resp. Exh. 2 (para. 5); see, R. 657).

The parents then went to the courthouse where, in the law library, their

counsel gave them an inch and a half thick file he had received from the Department. That was the parents' first opportunity to review the Department's packet of information. (Resp. Exh. 2 (para. 6); R. 657-63, 666).

According to Michelle, their counsel told them[4] that the Department had approximately 20 witnesses against them; that in all his years of practice that was the greatest number of witnesses he had experienced other than in a bank robbery case. Counsel said he was disadvantaged because he did not know who

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4. Little discussion occurred between counsel and the parents: "He was in and out of the room. [O]ne time he dropped a file off and then he'd leave and I don't know where he went. And then he would come back and he would sit down and he would talk for a little bit and then he would leave and we were in there talking amongst ourselves, me and Mitchell." (R. 705).

the witnesses against the parents were nor what they would say. (Resp Exh. 2 (paras. 7-8), R. 684; compare, R. 657, 658-59, 671 & Resp. Exh. 1 (p. 1, second para.)).

Counsel showed them a picture of Ben and said that the Department was prepared to prove that the parents had abused the child and that, "we couldn't prove that we didn't do it."[5] The parents' attorney told them the Department was ready to prove the alleged presence of drug paraphernalia in their apartment, and, in that context, suggested that they had only a 10% chance of winning. "He asked us whether we wanted

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5. In fact, Ben was, and had been for several weeks, suffering from impetigo, for which he was being medicated by both Michelle and her husband and the foster parents. (Resp. Exh. 2 (para. 7); R. 695-96).

to put ourselves through such a process." (Resp Exh. 2 (paras. 7-8), R. 684, 696; compare, R. 658-59; cf., R. 660).

Counsel said that with the evidence the other side had gathered, were the parents to go through with the hearing, "we would probably go to jail but that he might be able to work something out." (Resp Exh. 2 (para. 9), R. 684; see also, R. 694-95; contra, R. 660-61).

The Relinquishment Forms

While in the law library counsel presented to the parents a series of voluntary relinquishment of parental rights forms. (Resp. Exh. 2 (para. 9 & Exhs. A-D; App. A, pp. 13A-17A). As to what was discussed between clients and counsel about the forms, counsel's re-

collection included the following:[6]

> Q. What was the discussion concerning the voluntary relinquishment of parental rights as best you remember?
>
> A. Well, basically it was that once those documents were signed that those particular people, both Mr. and Mrs. Gibson, would [lose] all rights to their children forever.
>
> Q. Did they ask any questions about that?
>
> A. Now, that I can't, there was a lot of talk back and forth. Specifics I don't, I can't remember the exact words. We, of course, had been, that, as I recall took place in October of 1988, and we had been into court on the same thing I think back in

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6. This and all other references to testimony refer to a hearing held on February 24, 1989 in connection with Michelle's motion to correct errors. Compare, Ind.Tr.R. 59(H)(1988)(App. H, pp. 2H-3H).

April of 1988.[7] And those things were discussed then and it kind of goes back and forth as to what was discussed.

(R. 657-58).

Notification of Rights and Consequences

On the question of what notification of rights and consequences were given in the law library, Judge Stump asked the following questions and received the following answers:

> Q. Mr. Romero, prior to the execution of the document which is entitled Voluntary Relinquishment of Parental Rights by both Mitchell Allen Gibson and by Michelle Gibson, did you read to them the admonitions which are contained as a part of that Voluntary Relinquishment which is indicated to be a State form prepared, I believe, by the State Welfare Department, whoever? Did you go over each of those numbered admonitions to them

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7. The proceeding in April, 1988 was not to terminate parental rights; it was, rather, a periodic review. (R. 133-172; 578-642).

as to what rights they were [losing] and to what benefits that the children might achieve that they were forfeiting?

A. I went right through the form, Your Honor, and explained that. I don't think there was that many questions asked concerning because the people were really pretty caught up in what was being done.[8]

Q. But you did go down the list as it is prepared before it was signed by, by either or both of the parents?

A. Yes.

(R. 675-76).

At the time she signed the forms in the library (the parents' counsel served as the notary. (R. 264-76, 657)), Michelle was crying and very much upset. She felt at the time she had no alternative but to sign the form. (Resp. Exh. 2

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8. With respect to the words, "pretty caught up," counsel acknowledged that Michelle was crying at the time. (R. 676-77; see also, R. 704).

(para. 10); R. 684; see also, R. 694-95, 695-96, 697-99, 705-06; cf., R. 661-62). No one had told her what her rights were, including specifically the fact that the Department would be required to prove her impropriety as a parent by clear and convincing evidence. (R. 672, 684; Resp. Exh. 2 (para. 10); see, R. 708).

On the subject of coercion, connected with signing the waiver form, Michelle said,

> I was advised by my attorney that what I was feeling and my emotions at that time were not what that paper was stating. That I was not legally duressed or legally coerced by anyone.

(R. 698-99).

The Judgment: Parents Not Present

The library where the parents were located was approximately 40 feet away

from the courtroom. (R. 674). After Michelle and her husband signed the relinquishment forms counsel took them to the courtroom. (Resp. Exh. 2 (para. 11); R. 672, 684).

The forms were processed without either parent present. (R. 672; Resp. Exh. 2 (para. 11)). The process itself was not reported. (R. 339, 344-45).[9] Nothing in the record refers to, or suggests, that the court heard any evidence, under oath, or otherwise, other than whatever the parents' counsel may have said.

The court entered the following judgment:

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9. "The court reporter also stated in an affidavit that no record of the oral proceedings had been made." In re M.S., supra, 551 N.E.2d at 883. (App. D, p. 11D).

The Court now finds that the children who are subject of this proceeding have been removed from their parents for at least six (6) months under a dispositional decree; that said Mitchell Allen Gibson and Michelle Gibson are the natural parents of the children who are subject of this proceedding; that there is a reasonable probability that the conditions that resulted in the children's removal will not be remedied, that termination of the parental rights of the parents of said children is in the best interest of said children and the DeKalb County Department of Public Welfare has a satisfactory plan for the care and treatment of said children; that said parents have given their consent in writing in open Court before a person authorized by law to take acknowledgments; that said parents were notified of their constitutional and other legal rights and of the consequences of their actions under Section 3 of IC 31-6-5-3; that there is no evidence of fraud or duress to induce said parents to execute said voluntary relinquishment of their parental rights and that said parents are competent to give their consent to the termination of such parent/child

relationship.

IT IS THEREFORE CONSIDERED, ADJUDGED, DECREED AND ORDERED that the Voluntary Relinquishment executed by the natural parents of the children who are subject of this proceeding is now accepted and found by the Court to have been executed in accordance with the Statutes of the State of Indiana and that the relinquishment of the parental rights of Mitchell Allen Gibson and Michelle Gibson as parents of Michael Shane Stephenson, Benjamin Jeffery Gibson and Christopher Charles Gibson be and the same are accepted and are in the following words and figures, to-wit: (H.I.) (INSERTED ABOVE); that the children who are subject to this proceeding shall be permanent wards of the DeKalb County Department of Public Welfare to be placed by said Department in a suitable foster and/or adoptive home subject to the approval of the DeKalb County Department of Public Welfare.

The Court further FINDS that the DeKalb County Department of Public Welfare in the course of this proceeding have presented and made available to the natural parents of said

children all possible pre-placement, preventative and reunification services from November 24, 1986, to this date.

(R. 277-78).

Counsel explained why the parents were not present in the courtroom in these terms:

> Q. . . . Was, was there any reason to your knowledge, that they were not in the court-room?
>
> A. Well, I think at that point in time the sole purpose being, was because everybody was distraught, as naturally any parents who had given up their children would be. And I think that that's why it was more than anything else.
>
> Q. Was it their own choice not to be in here?
>
> . . . .
>
> A. Umhum (affirmative). I, I think that they didn't choose to be in here. I can't recall specifically. But I believe that because of the entire trauma of what they were doing that that was the

thought.

(R. 674-75; see also, R. 661-62).

Denouement

Apparently later in the day on October 4, the parents' counsel wrote a letter. (R. 668-71; Resp. Exh. 1). Among other things, counsel wrote:

> I think it is important that you people get on with your lives and make those changes that are in keeping with societal mores. I have no doubts about you, Michelle. I do; however, have doubts about you, Mitch.

(Resp. Exh. 1, p. 2).[10]

The Motion to Correct Errors: Evidentiary Hearing.

On December 2, 1988, after new counsel had appeared for Michelle (R. 279-85), she filed her motion to correct

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10. As of October 4, 1988, the parents had not fully paid their counsel's fee. (R. 669, 671; Resp. Exh. 1 (p. 2)).

errors, together with her affidavit. (R. 285-305; see also, R. 2-14). The motion to correct errors attacked the judgment on both statutory and constitutional grounds. (App. A).[11] It was heard on February 24, 1989. Evidence was received under oath, but only Michelle's former counsel and Michelle herself testified. (R. 320, 646-717). The court overruled the motion to correct error on April 13, 1989 by a docket entry. (R. 328; App. B).

The Appeal

On appeal Michelle argued that the court failed to comply with both the statutes referred to earlier and the Due

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11. The motion to correct errors (without memorandum) and the affidavit (with one of the relinquishment forms) are reproduced in accordance with this Court's Rule 14.1(h) in Appendix A.

Process Clause. She argued that she was entitled to a hearing on the question of whether her signature to the termination forms was voluntary. She also argued that the record failed to disclose whether the trial court inquired as to the reason for her absence from the courtroom. (App. C).[12]

Along with rejecting explicitly or implicitly each of the mother's constitutional points, the court disagreed with her contention that the statutory scheme called for a post-signature hearing on voluntariness. 551 N.E.2d at 883 (App D, pp. 9D-10D). It also rejected her contention that the record failed to

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12. Pages 10 to 20 of petitioner's brief on appeal (less footnote 6 which reproduced Ind. Code 31-6-5-3, supra) have been reproduced in Appendix C to comply with U.S.Sup.Ct.R. 14.1(h).

show that the court had inquired about her absence. It did so by casting the burden on Michelle to re-create unrepororted proceedings she did not attend. Id., at 883-84 (App. D, pp. 10D-13D); see, Ind.R.App.P. 7.2(A)(3)(c) (App. H, No. 3, pp. 3H-4H).[13]

Reasons for Granting the Writ

A WRIT SHOULD ISSUE BECAUSE THE RECORD REFLECTING A PARENT'S PERMANENT WAIVER OF HER RIGHTS TO HER CHILDREN DOES NOT SHOW THE WAIVER WAS FREE AND VOLUNTARY.

Introduction

Despite the rule of thumb that a fact-bound record means early death to

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13. The court also concluded that Michelle did not establish duress. Id., at 884. See, West's Ann. Ind.Code 31-6-5-(3) ("[T]he parents must be advised that: (1) their consent is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress. . . .")

most petitions for writ of certiorari, the Statement of the Case in this petition does contain factual questions. It is not short and the story it tells is not simple. Is it, therefore, to be consigned an early death?

If so, Michelle Stephenson will have forever lost her children. She has no chance of winning them back because the Indiana Court of Appeals has determined that her relinquishment of parental rights was not caused by duress. (App. D, pp. 13D-14D).

Is the case of a mother who signs away her life with her children worthy of this Court's attention? The answer is "yes," for the following reasons.

A. Preservation of Families Merits Equivalent Protections to Parents Who Sign "Voluntary" Waivers as it Does to those Parents Facing Involuntary Termination of their Parent-Child Bonds.

In Santosky v. Kramer, 455 U.S. 745 (1982), this Court held that, because parents have "a fundamental liberty interest protected by the Fourteenth Amendment" in their children, before the state may terminate that interest it must prove their parental incapacity by clear and convincing evidence. As it reached its holding the Court considered factors that apply equally to this case:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction

> of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Id., at 753-55.

The Court concluded that due process compelled the higher burden of proof because of the risk of error if the termination in fact were unfounded. The parent's interest was of paramount concern, for, unlike other proceedings having higher burdens of proof, termination of the parent-child relationship is permanent. Id. at 759. Furthermore, the State is likely to have substantially greater resources with which to prove its case than the parent has. Id., at 763.

The Court's solicitude for the interests of parents in their children is reflected in other contexts. Hodgson v. Minnesota, 497 U.S. ___, 58 U.S.L.W. 4957, 4964 (1990)(Stevens, J.); Id., at 4974-75 (Kennedy, J.); Caban v. Mohammed, 441 U.S. 380, 389, 391-91 (1979); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972).

It is not an overstatement to say that the American family as an institution is, and has been for some time, in a state of decline. Unless that apparent trend is reversed, weak and broken families endanger the stability of our society and the rights and expectations of its people; for failed families and non-existent families will produce an increasing share of our citizens in the future.

Thus, both the parent and the State have a substantial interest in maintaining wherever possible the bond of parent and child and, specifically, the bond of natural parent and child. That bond is protected by the clear and convincing burden of proof recognized in Santosky.

Does that protection, and the policies it reflects, drop from the picture when the involuntary termination proceeding is made unnecessary just before receipt of any evidence? Does a mother's signature to a "voluntary relinquishment" of parental rights destroy the interests Santosky, Stanley and other cases uphold?

A parent's bond with her children should not be so easily and irretrievably broken as Michelle Stephenson's was in this case.

B. A Mother Should at Least Have the Rights of a Criminal Defendant.

In Boykin v. Alabama, 395 U.S. 238, 242-44 (1969), the Court held that, before a criminal defendant's guilty plea may be accepted, the record must demonstrate the fact that the plea was willingly and knowingly made. The Court quoted Carnley v. Cochran, 369 U.S. 506, 516 (1962), a Sixth Amendment case, in support of its conclusion:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

395 U.S. at 242; see, Henderson v. Morgan, 426 U.S. 637, 642-46 (1976); McCarthy v. United States, 394 U.S. 459, 466-67 (1969)(Fed.R.Crim.P 11).

In this case the Indiana legislation provides for a waiver of parental rights outside the court's presence. Ind.Code 31-6-5-2(c). Petitioner does not attack the constitutionality of that feature of the statute. She does attack how the legislation was applied in this case. The Indiana law obviously contemplates the court will scrutinize a waiver not made in its presence.

In this case, when it comes to whether Judge Stump made any inquiry (not to mention investigation) about the voluntariness of Michelle's signature, the record is silent, but for the signed forms themselves. Ind.Code 31-6-5-2(c) requires the court to do more than merely look at a signed form.

Then, because the court reporter did not report, whatever did happen

between the court and Michelle's lawyer on October 4 is unknown (other than what can be gleaned from the judgment (supra, pp. 20-22)). The State's failure to preserve a record is raised on appeal to an appellate waiver: according to the Indiana Court of Appeals, Michelle should have attempted to recreate the record by affidavit or other means. In re M.S., supra;(App. D, pp. 11D-12D). How was she to do it since she was not there at the time?

The response to this argument is, of course, that Boykin involved a criminal defendant's interest not to be incarcerated, whereas Michelle does not lose her personal freedom when she loses her children. Lassiter v. Dept. of Social Services, 452 U.S. 18, 25-27 (1981). Is it so clear, however, that

permanent loss of one's children is less worthy of constitutional concern than temporary loss of one's physical freedom? In Santosky v. Kramer, then Justice Rehnquist said, in dissent,

> Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members.

455 U.S. at 787; see, Rivera v. Minnich, 483 U.S. 574, 579-81 (1987).

In any event, Lassiter does not bear on this case. Not having appointed counsel in a termination proceeding may endanger an indigent parent's interest in her children. Lassiter v. Dept. of Social Services, supra, 452 U.S. 18, 28-29. Not having a hearing, reported or otherwise, leaves Michelle Stephenson with no recourse and no hope. Her loss

is final.

She has never been found to be an unfit mother; nevertheless she now stands in substantially a poorer position than a burglary suspect who pleads guilty. His plea must be stated in open court with the voluntariness of his act checked then and there. She does not even have a transcript to look at.

Conclusion

The interests that Santosky and Stanley uphold require similar care when a parent is about to waive her rights to her children. Due process requires that, if the waiver does not occur in open court, the court must hold a noticed hearing, at which evidence is received, and after which the court finds, on the evidence, that the waiver was knowing and voluntary. Due process re-

quires that if the record is silent on these matters, whatever waiver may appear is void.

Because this petition presents an important question of federal law which has not been, but should be, settled by this Court, U.S.Sup.Ct.R. 10.1(c), a writ should issue. Upon consideration of this case on the merits this Court should reverse the judgment of the Indiana Court of Appeals and remand this action to the DeKalb Circuit Court with instructions to vacate its judgment and reinstate the Department's theretofore pending petition to terminate, involun-

tarily, Michelle Stephenson's relation with her children.

Respectfully submitted,

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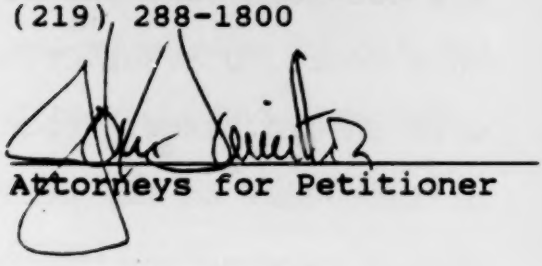

Attorneys for Petitioner

Appendix A

Motion to Correct Errors
Filed December 2, 1988
DeKalb County Circuit Court

STATE OF INDIANA, DEKALB COUNTY

DEKALB JUVENILE COURT

In the Matter of the Termination of the Parent-Child Relationship of Michael Stephenson, Benjamin Gibson and Christopher Gibson, Children, and Michelle Gibson and Mitchell Gibson, the children's parents.	)	Cause No. J-86-255

MOTION TO CORRECT ERRORS

Pursuant to Trial Rule 59(A)(8) and (H), Michelle Gibson, natural mother of the children involved in this matter, moves the Court to correct the following errors arising from its order terminating her parental rights, which order appears to have been entered on or about October 4, 1988:

1. Michelle Gibson's consitutional rights both under the Indiana and United States Constitution to procedural and substantive due process were violated

when she was persuaded by her own attorney to sign away her rights as natural mother of Michael Stephenson, Benjamin Gibson and Christopher Gibson on October 4, 1988 without first having been informed by the court or by anyone else of her rights, set forth in I.C. 31-6-5-3, as the childrens' parent.

2. The Court violated I.C. 31-6-5-2(c) when, on October 4, 1988, it adjudicated Michelle Gibson's rights as natural mother to Michael Stephenson, Benjamin Gibson and Christopher Gibson in Michelle Gibson's absence, without first determining after a hearing in open court whether she had been notified of her constitutional rights and other legal rights set forth in I.C. 31-6-5-3 before she signed a certain voluntary relinquishment of parental rights; by entering the order in

her absence even though she was apparently in the courthouse at the time; without inquiring as to the reason for her absence from the courtroom; without initiating an investigation to determine whether there was any evidence of duress or fraud involved in obtaining her signature to the form; without entering the results of the investigation (reported under oath) in the record and, finally, without engaging in any procedure by which the court could learn that in fact Michelle Gibson's signature to the relinquishment was not free, knowing or voluntary.

3. The court violated I.C. 31-6-5-3(8) by its failure to provide Michelle Gibson with a reasonable amount of time to review and consider the implications of her signature to the voluntary relinquishment form and by its failure to set

a hearing on the voluntariness of that decision at some date after October 4 before accepting the relinquishment form as binding upon her.

4. The Court's order terminating Michelle Gibson's rights as natural mother to Michael Stephenson, Benjamin Gibson and Christopher Gibson is void because it is based upon a purported relinquishment of her rights as natural mother which waiver was executed on the morning of the day in which the court adjudicated her parental rights; the order was entered without Michelle Gibson having been properly advised of her rights in the matter as set forth in I.C. 31-6-5-2(c) and 31-6-5-3, and was in fact not the free, willing and knowing decision of Michelle Gibson but rather was the product of inappropriate pressure, threats of

criminal liability, inadequate case preparation by her attorney and the provision of no instruction to her as to what her constitutional and legal rights were under the circumstances.

This motion is based upon the attached memorandum, the affidavit of Michelle Gibson filed this date in support of this motion well as the record in this action.

[Legal memorandum attached to motion has been deleted.]

AFFIDAVIT OF MICHELLE GIBSON IN SUPPORT OF MOTION TO CORRECT ERRORS

I, Michelle Gibson state as follows:

1. I am the natural mother of Michael Stephenson, Benjamin Gibson and Christopher Gibson and one of the respondent in this matter.

2. I request the Court to re-open this matter so that the DeKalb County Welfare Department be put to its proof to establish that I am unfit to serve as a parent to my children.

3. With respect to the petition to terminate my parental rights, I did not receive the petition itself. Rather, I was served with a summons, a copy of which is attached as Exhibit A, at some point after September 23, 1988.

4. I did not know that the Welfare Department intended to file a petition to

terminate my parental rights at any time before it was filed. I understand that the petition was filed on September 21, 1988.

5. I did not meet with my then attorney, Frederic L. Romero, until approximately 8:30 a.m. on October 4, 1988, the date the hearing was set. I and the boys' father (Mitchell Gibson) met with Mr. Romero at his office for approximately 10 minutes.

6. At approximately 9:00 a.m, the boys' father and I met with Mr. Romero at the courthouse for the hearing on the termination of our parental rights. Mr. Romero took Mitchell and me to the law library in the courthouse. He left and then returned with a file approximately an inch and a half thick. We were told by Mr. Romero to read through the file.

I did not have time or the ability to read and comprehend the file Mr. Romero presented us.

7. Mr. Romero told us that the Welfare Department had approximately 20 witnesses against us, that in all his 20 years of practice that number of witnesses was the greatest he had experienced other than a bank robbery case in which some 40 witnesses wre presented against his client. Mr. Romero suggested that we could not defeat a contention that Ben had been abused based upon a photograph of a bald spot on his head. (In fact Ben was suffering from impetigo that both the foster parents as well as I had had difficulty controlling despite regular medication).

8. During the course of our meeting with Mr. Romero in the library, he

discussed the alleged presence of drug paraphernalia in our apartment and, in that context, told us that we had only a 10% chance of winning and a 90% chance of losing. He asked us whether we wanted to put ourselves through such a process. He said the testimony of 20 witnesses would take days and that he was disadvantaged by not knowing who the witnesses were nor what they would say. (I am unaware of Mr. Romero conducting any discovery connected with the petition to terminate our parental rights. To the best of my knowledge he engaged in no discovery).

9. In that context, Mr. Romero said that with the evidence the other side had gathered, were we to go through with the hearing we would probably go to jail but that he might be able to work something out. Mr. Romero thereafter

presented us with the waiver of parental rights form and I and Mitchell signed the form. A copy of those forms signed by Mitchell are attached as Exhibits B, C and D. (I do not have copies of the forms I signed).

10. At the time that I signed the waiver form, I had been told by no one what my rights were, including specifically the fact that the Welfare Department would have to prove my impropriety as a parent by clear and convincing evidence. At the time that I signed the waiver I was crying and was very much upset. I felt at the time that I had no alternative but to sign the waiver form.

11. After our meeting in the law library, Mr. Romero took the forms away. Apparently he took them to the courtroom where other proceedings occurred. I ne-

ver went into the courtroom and, to my knowledge Mitchell, the boys' father, never went into the courtroom. I never received any instruction as to what my rights were under the circumstances either before I signed the consent form or at any other time, either by Mr. Romero or by anyone else.

12. I want to keep my children. I do not believe the Welfare Department can prove that I am unfit to be their mother, but, at the very least, I want the Welfare Department to prove whatever case it believes it has.

I affirm under the penalties of perjury that the foregoing representations are true.

Dated: December 2, 1988.

/s/ Michelle Gibson

. . . .

Exhibit B to Michelle Gibson's Affidavit

Voluntary Relinquishment of Parental Rights

Comes now in person Mitchell Allen Gibson, born December 26, 1963 acknowledges that he/she is the legal or alleged father (or is charged as being the legal or alleged father)* or mother of Benjamin Jeffery Gibson born 1982, in DeKalb County Auburn (City), Indiana (state).

The said Mitchell Allen Gibson does hereby in writing expressly consent and agree to the termination of his/her parental rights concerning the above said child.

The undersigned expressly acknowledges that he/she has been advised of the following and that he/she understands each of these following provisions (as specified in IC 31-6-5-3):

1. That my consent is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress or unless the parent is incompetent;

2. When the Court terminates the parent-child relationship all rights, powers, privileges, immunities, duties, and obligations (including any rights to custody, control visitation, or support) pertaining to that relationship are permanently terminated, and my consent to the child's adoption is

not required;

3. That I have a right to the care, custody, and control of my child as long as I fulfill my parental obligation;

4. That I have a right to a judicial determination of any alleged failure to fulfill my parental obligations;

5. That I have a right to assistance in fulfilling my parental obligations after a Court has determined that I am not doing so;

6. Proceedings to terminate the parent-child relationship against my will can be initiated only after:

   (a) My child has been adjudicated a delinquent child or child in need of services and the child has been removed from my custody following adjudication; or

   (b) My conviction and imprisonment for one (1) of the following offenses, which are listed in IC 3-6-5-4, 1(a):

      (i) Murder (IC 35-42-1):

      (ii) Causing Suicide (IC

35-42-1-3):

(iii) Voluntary Manslaughter (IC 35-42-1-4):

(iv) Involuntary Manslaughter (IC 35-42-1-4):

(v) Rape (IC 35-42-4-1):

(vi) Criminal Deviate Conduct (IC 35-42-4-2):

(vii) Child Molesting (IC 35-42-4-3):

(viii) Child Exploitation (IC 35-42-4-4):

(ix) Incest (IC 35-46-1-3).

and the victim of said offense was under sixteen (16) years of age at the time of the offense and is my biological or adoptive child.

7. That I am entitled to representation by a lawyer, provided by the state, if necessary throughout any proceedings to terminate my parent-child relationship against my will;

8. That I will receive notice of the hearing at which the court will decide if my consent was voluntary, and that I may ap-

pear at the hearing and allege that it was not voluntary. Such notification may be sent to myself at the following address.

_____

or as I may otherwise subsequently direct in writing.

I fully understand that in the event that a court of competent jurisdiction should terminate my parental rights to the above said child, that the said child and I shall then lose all our legal rights, obligations, privileges and duties with respect to each other, including, but not necessarily limited to, the right of inheritance and the right to control or consent to adoption.

I hereby transfer custody of said child to the DeKalb County Department of Public Welfare

_____

(Name of CDPW/Licensed Child Placing Agency)

Courthouse Auburn

(address) (City)

In order for that agency to make an appropriate placement for the child in accordance with the law.

I swear and/or affirm that my signature

to this document has been freely given without coercion, duress or the exercise of undue influence.

Parent's Signature

/s/ Mitchell Gibson Date 10/4/88

Printed/Typed Name

/s/ Mitchell Allen Gibson

Address (street, city and state)
2719 Apt. 3 Northgage Blvd., Ft. Wayne, IN

Zip Code

*I further realize that my signature to this document is not an admission that I am the legal or alleged father of the said child.

Acknowledged and signed before me, the undersigned, a notary public or other person authorized to take acknowledgements (IC 31-3-1-6) this 4th day of October, 1988.

Signature — Printed/Typed Name, Title

/s/ Frederic L. Romero

Name of CDPW/Licensed Child Placing Agency

DeKalb County Dept. of Pub. Welfare

County of Residence of Notary Public

Allen

My Commission or Authorization Expires (Date)

October 25, 1991

[Other exhibits to Michelle Stephenson's affidavit have been deleted.]

Appendix B

DeKalb Circuit Court
Minute Entry of 4/13/89

FILE DATE: 4/13/89

The DeKalb County Department of Public Welfare, by counsel Kirk D. Carpenter, files motion for post-hearing submission, together with the affidavit of Jan Merrill, caseworker of said Department, relating to the Motion to Correct Errors filed by Michelle Gibson, mother of the children who are subject of this Children in Need of Services Proceeding, which submission and affidavit are in the following words and figures, to-wit: (h.i.)

The Court now considers all matters submitted at the hearing on the Motion to Correct Errors filed herein and heard on February 24, 1989, and the Court further examines and considers said submission by the DeKalb County Department of Public Welfare and the affidavit filed therewith, together with the communication filed by counsel for said Michelle Gibson on March 1, 1989, five (5) days after the hearing on said Motion to Correct Errors on February 24, 1989, but accepted by the Court in spite of the prohibition against such filing contained in Trial Rule 59-(H)(4) of the Indiana Rules of Trial procedure, said post-hearing submissions and affidavits being the further proceedings

contemplated by the Court in the entry and order of March 1, 1989, the date the Court took under advisement the ruling on said Motion to Correct Errors. The Court now overrules and denies the Motion to Correct Errors filed by said Michelle Gibson.

/s/ Harold D. Stump
Harold D. Stump, Special Judge

Appendix C

Portions of Michelle Stephenson's Brief filed with the Indiana Court of Appeals

Summary of Argument

I.C. 31-6-5-2 governs voluntary relinquishment of parental rights. It, in conjunction with I.C. 31-6-5-3, demonstrates the State's concern that such rights be safeguarded from decisions not carefully thought through or marred by duress or coercion. This case demonstrates why that legislation's mandatory terms must be enforced. In this case Michelle Gibson did not give her consent in open court; before signing the relinquishment forms, she was not informed of her constitutional and legal rights nor the consequences of her consent; the court held no hearing on whether her consent was voluntary and, in fact, her "consent" was a nullity because it was steeped in duress. The procedure by which Michelle Gibson purportedly gave up

her rights to her children was so far beyond statutory norms that it constituted a denial of her rights to procedural and substantive due process under both the Indiana and United States Constitutions.

Argument

THE JUDGMENT IS DEFECTIVE BECAUSE (A) THE PARENTS WERE NOT INFORMED OF THEIR CONSTITUTIONAL AND LEGAL RIGHTS, (B) NO HEARING ON THE VOLUNTARINESS OF THEIR RELINQUISHMENT OF PARENTAL RIGHTS WAS HELD BEFORE JUDGMENT WAS ENTERED, (C) THE ALLEGED RELINQUISHMENT WAS IN FACT NOT VOLUNTARY AND (D) THE ENTIRE PROCESS DENIED RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

Indiana Code 31-6-5-2 and 31-6-5-3 cover the procedure by which a parent may voluntarily relinquish her relationship with her natural children. it is clear, under I.C. 31-6-5-2(c), that in order for a valid voluntary termination of parental

rights to occur,

> The parents must give their consent in open court unless the court makes findings of fact upon the record that:
>
> (1) the parents gave their consent in writing before a person authorized by law to take acknowledgments;
>
> (2) they were notified of their constitutional rights and other legal rights and of the consequences of their actions under section 3 of this chapter; and
>
> (3) they failed to appear.
>
> Before the court may enter a termination order, it must inquire about the reasons for the parents' absence, and may require an investigation by a probation officer to determine whether there is any evidence of fraud or duress and to establish that the parents were competent to give their consent. The investigation must be entered on the record under oath by the person responsible for making it. If there is any competent evidence of probative value that fraud or duress was present when the written con-

> sent was given . . . the court shall dismiss the petition or continue the proceeding. (Emphasis added).

Several elements of this legislation control the outcome in this case.

A. The Parents Were Not Informed of Their Constitutional and Legal Rights.

I.C. 31-6-5-2(c) assumes that, in the ordinary case, a voluntary relinquishment of parental rights will occur in open court. The policy of the law is obvious. It is important that the court observe the demeanor of the parents in order to minimize the possibility that, in fact, the parents' decision is not voluntary. Where the parents are not available for the court's observation, then the protective devices set forth in the balance of I.C. 31-6-5-2(c) come into play.

As to the balance of I.C. 31-6-5-2(c), the key factor is "the record:" "The parents must give their consent in open court unless the court makes findings of fact upon the record . . . ." It is clear that the Gibsons were not in open court when the court decided to adjudge their relationship with their children terminated. That they were 40 feet away in a law library, "because everybody was distraught, as naturally any parents who had given up their children would be" (R. 674-75), does not suffice to meet I.C. 31-6-5-2(c)'s mandatory terms. "The parents must give their consent in open court." See, Holderness v. Holderness (1984), Ind.App., 471 N.E.2d 1157, 1159-60.

One of the several problems with this case is the fact that there was no

record. The court's acceptance of the relinquishment forms just executed by Michelle Gibson and her husband was not reported. (R. 339, 344-45). All we have in the way of knowing what happened in the courtroom among counsel for the parents and the Department and the court is what the parents' counsel could recall and what appears as the court's minutes. (R. 277-78, 654-77). The court's minute for October 4 includes language to the effect that Michelle and her husband were informed of their rights as required by I.C. 31-6-5-2(c)(2): "that said parents were notified of their constitutional and other legal rights and of the consequences of their actions under Section 3 of IC 31-6-5-3." (R. 277).[1] However, counsel for the Gibson's recollection of the

---

6. [Text of Ind.Code 31-6-5-3 deleted.]

subject was decidedly dim (R. 657-58) until rescued by the court's leading questions. (R. 675-76). In comparison, Michelle Gibson's testimony is clear. She received no information about her rights from her attorney (the only person who is even claimed to have made a stab at the job) or from anyone else. (Resp. Exh. 2 (para. 10); R. 684).

This paucity of record should be compared with the waiver of counsel in Keen v. Marion Cty. Dept. of Pub. Welfare (1988), Ind.App., 523 N.E.2d 452. As Keen held, a waiver of the right to counsel in the context of termination of parental rights need not meet constitutional prerequisites applicable in criminal cases. Id., at 455-56. On the other hand, surely when dealing with the "important interest" of a "parent's de-

sire for and right to the companionship, care, custody and management of his or her child," Id., at 455 (Citing, Lassiter v. Dept. of Social Services (1981 , 452 U.S. 18, 68 L.Ed.2d 640, 101 S.Ct. 2153), the court must, at least, create a record that in fact the parents were actually informed of their rights. Certainly the trial court in Keen did much more than was done in this case to make the appellate court's decision an easy one. See, 523 N.E.2d at 453-54.

Creation of an adequate record showing that the affected parent actually was informed of her rights, as prescribed in mandatory terms by statute, I.C. 31-6-5-2(c), is exactly what did not happen in this case. The judgment is defective because, contrary to I.C. 31-6-5-2(c)(2), Michelle Gibson was not "notified of

[her] constitutional rights and other legal rights and of the consequences of [her] actions under section 3 of this chapter."

B. The Court Held No Hearing on Voluntariness of the Parents' Relinquishment of Rights Before Entering Judgment.

The judgment below is based upon a defective record in other respects. Implicit in I.C. 31-6-5-3(8) is the fact that acceptance of a purported voluntary consent cannot occur until a hearing, held at some point after the affected parent signs the consent form, happens first. Moreover, that hearing must be preceded by proper notice to the affected parent.

These contentions are based on the following considerations. Among the legal rights referred to in I.C. 31-6-5-

2(c)(2) (of which consenting parents must be informed) is this one, appearing in I.C. 31-6-5-3(8):

> They will receive notice of the hearing at which the court will decide if their consent was voluntary, and that they may appear at the hearing and allege that it was not voluntary. (Emphasis added.)

Subparagraph (8) is obviously directed toward making sure that parents do not lightly lose their rights as parents. It clearly speaks of a "cooling off" period, during which parents can weigh the implications of what they are in process of doing. It decidedly is antithetic to the one day, "do it now" process this case demonstrates.

This conclusion is supported by I.C. 31-6-7-5(a). I.C. 31-6-7-5(a) sets forth the requisite notice for any hearing (including the type at issue here) held un-

der the Juvenile Code. I.C. 31-6-7-5(a) provides in relevant part,

> . . . . Personal service must be made at least three (3) days before the hearing to which the person is summoned. Service by mail must be sent at least ten (10) days before the hearing . . . .

As argued above, Michelle Gibson's alleged voluntary relinquishment of parental rights did not take place in open court. Under I.C. 31-6-5-3(8), she was entitled, at least, to a hearing to determine whether her consent was voluntary. Pursuant to I.C. 31-6-7-5(a), that hearing could not occur, at the earliest, until three days after she had been served personally with notice (or 10 days after service by mail). No such notice was given in this case; no such hearing was held.

It may be argued, however, that

subparagraph (8) of I.C. 31-6-5-3 is merely language that must be spoken to parents about to sign a voluntary relinquishment form, with no further force or effect. This, of course, would render subparagraph (8) meaningless surplusage. It is a fundamental principle of legislative interpretation that all language within a statute be given effect, if possible. Baker v. State (1985), Ind. App., 483 N.E.2d 772, 774; Brook v. State (1983), Ind.App., 448 N.E.2d 1249, 1250-51. As the court put it in Sidell v. Rev. Bd. of Indiana Empl. Sec. Div. (1981), Ind.App., 428 N.E.2d 281, 284,

> [W]e use the established principle of construction that all language in a statute will be deemed to have been used intentionally. Words or clauses in a statute are to be treated as surplusage only in the absence of any other possible course. (Citation omitted.)

Therefore, in order to give meaning to I.C. 31-6-5-3(8), that statute must be read as it reads: Michelle Gibson should have received appropriate notice, at least three days' worth, after signing the relinquishment forms, of a hearing to determine whether her consent was voluntary or not. See, Matter of Laney (1986), Ind.App., 489 N.E.2d 551, 553-54.

In this case, contrary to I.C. 31-6-5-3(8), the court accepted the consent and entered an order terminating the parent-child relationship on October 4, the same day the consent was signed. Indeed, it appears that the order was entered within minutes after Michelle Gibson signed the form in the law library some 40 feet away. This failure to comply with I.C. 31-6-5-3(8) alone renders the judgment invalid.

C. In Fact, the Alleged Relinquishment Was Not Voluntary.

There is nothing in the record that suggests the court "inquire[d] about the reasons for the parents' absence." I.C. 31-6-5-2(c). There is nothing in the record to suggest that the court inquired as to whether there was "any evidence of fraud or duress," Id., connected with the Gibson's signatures to the form, other than what their counsel may have reported. (R. 277).

In fact, evidence of duress permeates this case, as a comparison of Michelle's testimony with that of her former counsel will demonstrate. The consent form was signed under circumstances that clearly constituted substantial (not "any") evidence of duress. (Resp. Exh. 2 (para. 10); R. 684, 694-95, 695-96, 697-99, 705-06). Michelle Gibson's

act of signing the relinquishment form was not made in the absence of duress. On the contrary it was enveloped in duress. Had the trial court held a hearing on the matter, the so-called Voluntary Relinquishment of Parental Rights would have been determined a nullity under I.C. 31-6-5-2(c) and I.C. 31-6-5-3(8).

D. The Entire Process Denied Rights to Procedural and Substantive Due Process.

As discussed in the first three sections of this argument, the procedure followed in this case is stigmatized by a series of flagrant violations of the letter and spirit of I.C. 31-6-5-2(c) and I.C. 31-6-5-3(8). It also embodies a series of denials of Michelle Gibson's rights under the Fourteenth Amendment of the United States Constitution and Art-

icle 1, Section 12 of the Indiana Constitution.

The statutes just noted gave Michelle Gibson a right to information; she did not receive that information. The statutes gave her a right to a hearing on whether her "consent" was voluntary; she received no such hearing. The statutes gave her a right to time -- three to ten days -- before her consent could be held binding (and only after the court determined that her consent was voluntary); she received no such time. Finally, the statutes were written so that duress would be uncovered by appropriate investigation; Michelle Gibson received from the court not even a cursory check to determine whether "duress was present when the written consent was given." I.C. 31-6-5-2(c).

This catalogue of impropriety compels, as a matter of constitutional law, reversal of the judgment.

Conclusion

The record this case presents is exactly the sort of situation I.C. 31-6-5-2 and 31-6-5-3 were enacted to avoid. Given the constitutional and statutory disability of the entire procedure by which the relinquishment of parental rights was acquired and ruled upon, this court should set aside the trial court's adjudication. This matter should be remanded so that the DeKalb County Welfare Department may be put to its proof, by clear and convincing evidence, Ellis v. Knox County Dept. of Public Welfare (1982), Ind.App., 433 N.E.2d 847, to establish whether, in fact, Michelle Gibson is an unfit mother to her three

children. I.C. 31-6-5-4. The law looks to substantive resolution of fundamental parental interests, not their destruction by, in this case, illegal procedural device.

Appendix D

Opinion of the Indiana Court of Appeals
March 21, 1990

IN THE COURT OF APPEALS OF INDIANA

THIRD DISTRICT

In re: M.S., B.G., and C.G., children in need of service	)	
MICHELLE GIBSON, Natural Mother-Appellant	)	
	)	No. 17A03-8904-CV165
DEKALB COUNTY DEPARTMENT OF PUBLIC WELFARE	)	
Petitioner-Appellee	)	

APPEAL FROM THE DEKALB CIRCUIT COURT
The Honorable Harold D. Stump
Special Judge
Cause No. 17C01-8611-JC-25501

GARRARD, P. J.

Michelle Gibson appeals the judgment of the DeKalb Circuit Court terminating the parent-child relationship between her

and her three children. On review she presents several issues which we restate as follows: Whether the trial court accorded Michelle Gibson her procedural rights in accordance with IC 31-6-5-2(c) when it accepted her signed statements voluntarily relinquishing her parental rights.

We affirm.

On November 24, 1986 Mitchell and Michelle Gibson agreed that their three sons should be made temporary wards of the DeKalb County Department of Public Welfare. The children were adjudicated children in need of services and placed in foster care, and the Gibsons were offered counseling and other services to overcome their problems. Over the next two years the arrangement was periodi-

cally reviewed, and the Gibsons did not demonstrate an ability to overcome their problems and resume caring for the children. Finally, on September 21, 1988, the Department of Public Welfare filed its petition to terminate the parent-child relationship and hearing was set for October 4, 1988.

On the day of the hearing, the Gibsons' attorney met with them in the court's library. He advised them that approximately 20 witnesses could testify against them and there were some serious allegations. He discussed their options which included signing papers to voluntarily relinquish their parental rights. He presented the Gibsons with "Voluntary Relinquishment of Parental Rights" forms and the Gibsons signed them. Their attorney notarized their signatures and

took them into the courtroom. The court entered its judgment and written findings of fact, wherein it accepted their relinquishment as voluntary and terminated the parent-child relationship.

On December 2, 1988 Michelle, by new counsel, filed her motion to correct errors.[2] The motion was heard on February 24, 1989, at which time the court heard evidence from both Michelle and her former counsel. Both testified that Michelle and Mitchell had not appeared in the courtroom during the termination hearing. Their participation in the proceedings took place in the court library with their attorney entering from time to time and returning to the courtroom. The attorney testified

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2. Mitchell did not challenge the decision.

that Michelle was distraught. Only he appeared for them in court.

Discussion and Decision

Michelle contends that she was deprived of her procedural rights because the trial court failed to follow the procedures set out in IC 31-6-5-2. Specifically, because she did not consent in open court, she contends she was entitled to be informed of her constitutional and legal rights and was entitled to a separate hearing on the voluntariness of her consent. She contends that she was not informed of her rights and did not have a hearing to determine whether her consent was voluntary. Moreover, she contends that her relinquishment of parental rights was not voluntary and that the court failed to inquire as to the reasons for her absence from the courtroom.

These failures, she argues, violate her statutory and constitutional right to due process.

Parents must consent to terminate the parent-child relationship in open court unless the court makes certain findings of fact. IC 31-6-5-2(c). The Department of Public Welfare argues that Michelle gave her consent in open court; her attorney, as her legal representative, was authorized to act for her in this proceeding as if her were she. We cannot say that by signing voluntary termination papers in the court's library down the hall, Michelle terminated her parent-child relationship in open court. "Open court" necessarily means in the presence of the judge when court is in session. Her attorney cannot be her substitute in this matter. Michelle's pre-

dicament is analogous to the guilty plea defendant. A defendant must personally plead guilty; his lawyer may not plead guilty for him in his absence. The parent-child relationship is an important liberty interest in which the state cannot interfere without providing the parents fundamentally fair procedures. Santosky v. Kramer (1982), 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1395, 71 L.Ed.2d 599, 606; Adoption of Hewitt (1979), Ind. App., 396 N.E.2d 938, 940. To allow Michelle's attorney to consent to termination of those rights in her absence, without further safeguards, would be fundamentally unfair and would violate the Indiana statute.

The Indiana Code does, in fact, provide safeguards. Parents may consent to terminate their parent-child relation-

ship out of court if the court makes findings of fact upon the record that the parents (1) gave their consent in writing before a person authorized by law to take acknowledgements, (2) were notified of their rights and the consequences of their actions under IC 31-6-5-3, and (3) failed to appear. IC 31-6-5-2(c). However, before the court may enter a termination order, it must inquire about the reasons for the parents' absence from court. Id.

The record shows that Michelle was advised of the rights and consequences enumerated under IC 31-6-5-3. Her attorney testified that he had informed her before she signed; moreover, the list of rights and consequences was reproduced on each of the "Voluntary Relinquishment of Parent Rights" forms that she signed.

This evidence was sufficient for the trial court to conclude that she had been properly advised.

Michelle bases her contention that she is entitled to a separate hearing on the voluntariness of her consent on IC 31-6-5-3(8) which states: "For purposes of [IC 31-6-5-2], the parents must be advised that . . . they will receive notice of the hearing at which the court will decide if their consent was voluntary, and that they may appear at the hearing and allege that it was not voluntary." Michelle argues that it is implicit in this provision that the court may not accept a purported voluntary consent until it holds a hearing after the parent signs. This is plainly not what the statute says. The statute says that a parent signing a consent form is

entitled to receive notice of the hearing at which the court accepts her consent to relinquish parental rights and at which the court will determine if her consent was voluntary. This case arose under a petition for involuntary termination of parental rights. Michelle had notice of this hearing. Though the hearing's purpose changed when she signed consent forms to relinquish her parental rights, she nevertheless had notice of this hearing, and she chose not to attend or to tell the judge that her consent was not voluntary. As with her other rights, the consent form she signed expressly advised her of her right to appear at the hearing and to dispute the voluntariness of her consent.

Michelle also states that there is nothing in the record that "suggests"

that the court inquired about the reasons for her absence in the courtroom. IC 31-6-5-2(c). It would be error for the court to terminate her parental rights without inquiring about her absence from the courtroom. The only record of the hearing is the court's order book entry stating that hearing was held and making findings. The entry is silent as to whether the court inquired about her absence. The court reporter also stated in an affidavit that no record of the oral proceedings had been made. From this record, we are unable to determine that the court did not make an appropriate inquiry.

If no report of all or part of the evidence or proceedings at the hearing was made, a party may prepare a statement of the proceedings from the best avail-

able means. Ind. Rules of Appellate Procedure 7.2(A)(3)(c). This statement may be submitted to and settled and approved by the trial court. Id. Michelle made no effort to reconstruct the record. Her case is analogous to one where the record has been destroyed leaving only the docket entry that was insufficient to show a knowing and voluntary guilty plea. When the record is lost, the appellant must attempt to reconstruct it pursuant to Ind. Rules of App. Procedure 7.2(A)-(3)(c). Graham v. State (1984), Ind. App., 468 N.E.2d 604, 605. See also Zimmerman v. State (1982), Ind., 436 N.E.2d 1087, 1089. Courts speak only by their records. Taylor v. Butt (1972), 154 Ind.App. 196, 198, 289 N.E.2d 159, 161. Unless what did or did not happen at the hearing is made part of the record

pursuant to AR 7.2(A)(3)(c), this court is unable to consider the issue. Dean v. Insurance Co. of North America (1983), Ind.App., 453 N.E.2d 1187, 1191; Indiana and Michigan Electric Co. v. Pounds (1982), Ind.App., 428 N.E.2d 108, 109; Bechert v. Lehe (1974), 161 Ind. App. 454, 461 316 N.E.2d 394, 399.

Michelle finally contends that she consented under duress to relinquish her parental rights. As proof of duress, Michelle says that she was emotionally upset. However, there is no evidence that at the time of her consent she was incoherent or distraught to such a degree that she could not control her faculties. Brown v. State (1985), Ind., 485 N.E.2d 108, 113; Borkholder v. State (1989), Ind. App., 544 N.E.2d 571, 575. At the hearing on the motion to correct errors,

Michelle testified on cross examination that no one physically threatened her to sign. The trial court did not err when it found that Michelle's consent was voluntary. Having also been unable to find any deviation from IC 31-6-5-2, we also find that Michelle was not denied her constitutional right to due process.

Affirmed.

HOFFMAN, P. J. Concurs, STATON, J. Dissents and files separate opinion.

STATON, J.

Dissenting Opinion

A separation of a mother from her child by terminating all parental rights should be justified by the record. In the severing of the relationship between parent and child in the appeal before us, the record is silent. There is not a glimmer of comfort from the record before

us that all the statutory and constitutional safeguards were observed. As the Majority points out, the record is silent.

> "Michelle also states that there is nothing in the record that 'suggests' that the court inquired about the reasons for her absence in the courtroom. IC 31-6-5-2(c). It would be error for the court to terminate her parental rights without inquiring about her absence from the courtroom. The only record of the hearing is the court's order book entry stating that hearing was held and making findings. The entry is silent as to whether the court inquired about her absence. The court reporter also stated in an affidavit that no record of the oral proceedings had been made. From this record, we are unable to determine that the court did not make an appropriate inquiry."

If we cannot make a determination that the trial court made an inquiry by its minutes or findings, it is my position that on appeal we must conclude that the

trial court did not make an inquiry. If this void in the record cannot be corrected, a new hearing should be granted.

Rules of Appellate Procedure 7.2(C)-(2) permits this Court on its "own initiative" to order up from the trial court a supplemental record. The Rule further provides that the "inadequacy of the record shall not constitute a ground for . . ." precluding a review on the merits. Rules of Appellate Procedure 7.2(A)(3)(c) provides:

> If no report of all or part of the evidence or proceedings at the hearing or trial was or is being made, or if a transcript is unavailable, a party may prepare a statement of the evidence of proceedings from the best available means, including his recollection. If submitted contemporaneously with the matter complained of, the statement may be settled and approved by the trial court. If submitted thereafter, the statement shall be served on other parties who may

> serve objections or prepare amendments thereto within ten (10) days after service. The statement and any objections or prepared amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall become a part of the record and be included by the clerk of the trial court in the record.
>
> If statements or conduct of the trial judge are in controversy, the statement shall be supported by sworn affidavit which shall be submitted to the trial judge for his certification. If he refuses to certify the statement he shall file opposing affidavits. All such affidavits shall be included in the record by the clerk of the trial court.

On appeal, this Court cannot assume away that certain safeguards were carefully observed. Our assurance that the proper procedures were observed must come from the record before us. In the present termination of parental rights appeal, there is none. The record is silent. Certainly a parent's rights to

its child are as important as those of a criminal defendant who has a right to have a record made of his advisement and the showing of his presence as a matter of record. I dissent and would order a supplemental record as provided by the rules and if this could not be done than I would order a new hearing.

Appendix E

Indiana Court of Appeals'
Order of June 5, 1990
Denying Petition for Rehearing

Cause Number
17A03-8904-CV-00165

GIBSON, MICHELLE -V- DEKALB CTY. DEPT. OF PUBLIC WELFARE

You are hereby notified that the Court of Appeals has on this day 6/05/90 APPELLANTS PETITION FOR REHEARING DENIED.

WESLEY W. RATLIFF, JR., CHIEF JUDGE.

STATON, J. WOULD GRANT REHEARING.

Appendix F

Petition for Transfer to Indiana Supreme Court Filed June 25, 1990

IN THE INDIANA SUPREME COURT

NO. _____

IN RE MICHAEL STEPHENSON, BENJAMIN GIBSON, and CHRISTOPHER GIBSON	
MICHELLE GIBSON, Appellant, v. DEKALB COUNTY DEPARTMENT OF PUBLIC WELFARE Appellee.	Hon. Harold Stump, Special Judge, DeKalb County Circuit Court, Trial Court No. 17C01 8611-JC-25501; Court of Appeals No. 17A03-8904-CV-00165

PETITION FOR TRANSFER

Pursuant to Rule 11(A) of the Indiana Rules of Appellate Procedure, natural mother-appellant Michelle Gibson petitions for transfer upon the following grounds:

1. This petition stems from a mother's efforts to reverse a judgment based on her allegedly voluntary relinquishment of parental rights to her three children in a proceeding she did not

attend and which was not reported. The case involves the interplay of I.C. 31-6-5-2(c), I.C. 31-6-5-3, I.C. 31-6-7-5(a) and Ind.A.R. 7.2(A)(3)(c) and 7.2(C).

2. The Court of Appeals issued its written opinion, Staton J., dissenting, affirming the judgment below on March 21, 1990. The decision is reported. In re M.S. (1990), Ind.App., 551 N.E.2d 881. By affirming the trial court's grant of judgment based on the relinquishment the Court of Appeals' decision was against Michelle Gibson.

3. Michelle Gibson timely filed her petition for rehearing on April 10, 1990. The Court of Appeals denied that petition on June 5, 1990.

4. The decision of the Court of Appeals is in error in that the Court applied Indiana Appellate Rule 7.2(A)(3)-

(c) in such a way that it denied Michelle Gibson her rights to due process under Indiana's and the United States Constitutions. This point is based on the following considerations:

(a) While the Court of Appeals acknowledged that Michelle Gibson's relationship with her children is an important interest in which the state cannot interfere "without providing the parents fundamentally fair procedures," 551 N.E.2d at 883 (citing, Santosky v. Cramer (1982), 455 U.S. 745, 753-54, 71 L.Ed.2d 599, 102 S.Ct. 1388), nevertheless, on the basis of an "analogy" to criminal proceedings where a record has been destroyed, it imposed on her the burden to prepare a settled statement of the facts necessary to

show whether Judge Stump complied with the safeguards to relinquishment of parental rights set forth in I.C. 31-6-5-2(c), when Michelle Gibson was not present at the hearing; Judge Stump failed to maintain a record even though the court obviously had the capacity to do so, 551 N.E.2d at 883; and Michelle Gibson was represented by counsel who was unprepared for a termination hearing set on the date the purported voluntary relinquishment forms were signed and accepted. As the dissent stated:

> If we cannot make a determination that the trial court made an inquiry by its minutes or findings, . . . on appeal we must conclude that the trial court did not make an inquiry. If this void in the record cannot be corrected, a new hearing should be granted.

551 N.E.2d at 884.

(b) In this case no record was destroyed; the record was never created in the first instance. Judge Stump did not enter findings sufficient to establish that, in fact, he did inquire about the reasons for Michelle's and her then husband's absence from court, 551 N.E.2d at 883, which inquiry, in turn, is commanded by I.C. 31-6-5-2(c): "Before the court may enter a termination order, it must inquire about the reasons for the parents' absence . . . ." (Emphasis added).

5. The Court of Appeals' decision contravenes this Court's decision in Emmons v. State (1986), Ind., 492 N.E.2d 303, 305. This point is based on paragraphs 4(a) and (b) above and the fact

that, while Emmons dealt with a criminal defendant's rights on appeal, that case stands on the Fifth and Fourteenth amendments' guarantees of due process, rights to which Michelle Gibson, in her capacity of natural mother, is also entitled. Stanley v. Illinois (1972), 405 U.S. 645, 650-52, 656-58, 31 L.Ed.2d 551, 92 S.Ct. 1208.

6. The Court of Appeals' decision erroneously decided a new question of law by restricting applicability of Rule 7.2-(C) of the Indiana Rules of Appellate Procedure without benefit of principle or rationale. This point is based on the following considerations:

Given "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child," Santosky v. Kramer, supra, 455 U.S. 745,

753, the Court of Appeals erred by failing to resort to Indiana Appellate Rule 7.2(C)'s provision that,

> If anything material to either party is omitted from the record . . ., the trial court shall . . . (2) upon the order of the court of appeal pursuant to the motion of a party or on its own initiative correct the omission . . . and if necessary certify and transmit a supplemental record.

In so doing, the court appears to have made Rule 7.2(C) unavailable to natural parents injured by unreported judicial activities. See and compare, Stump v. Sparkman (1978), 435 U.S. 349, 351-55, 363, 366-67, 368-69, 370, 55 L.Ed.2d 331, 98 S.Ct. 1099. While it is true that Michelle Gibson did not move under A.R. 7.2(C) for leave to attempt to reconstruct what Judge Stump did or did not do in her absence either at the trial level or before briefing before the Court

of Appeals, she did so as an alternative request for relief in her April 10, 1990 petition for rehearing. In any event, by A.R. 7.2(C)'s terms, its operation is not limited to the appellant's initiative.

7. The Court of Appeals' decision erroneously decided a new question of law by reading I.C. 31-6-5-3(8) in a fashion inconsistent with the fundamental rights a parent has in her relation with her children. The Court ignored the obvious intent of I.C. 31-6-5-3(8) that a noticed hearing precede by at least three days, I.C. 31-6-7-5(a), acceptance of what is purported to be a "voluntary relinquishment of rights." In so doing the Court ignored the Legislature's obvious intent to protect parents from improvidently relinquishing such rights.

8. The decision of the Court of

Appeals fails to give a statement in writing necessary to decide each substantial question arising on the record and argued by the parties in that the Court inaccurately stated facts important to decision of the case. Given the nature of the natural mother's constitutional and procedural challenges asserted in this case, the Court of Appeals' statement of facts in its opinion was incorrect or incomplete in the following ways:

(a) The statement in the second paragraph of the opinion at 551 N.E.2d 882, "and the Gibsons did not demonstrate an ability to overcome their problems and resume caring for the children," is unsupported by any evidence presented in any hearing below. The statement could only be

based upon the Court of Appeals' review of papers filed in the trial court, papers which themselves reflect internal differences and contradictions and which, in any event, were not received in evidence in any proceeding relating to the asserted voluntary relinquishment of parental rights on October 4, 1988 or at the hearing on the motion to correct errors on February 24, 1989 or at any other time.

(b) The last sentence in the second paragraph at 551 N.E.2d 882 should be supplemented with the following underlined language: ". . . and hearing was set for October 4, 1988 <u>at 9:00 a.m.</u>"

(c) The statements in the first two sentences in the third full para-

graph at 551 N.E.2d 882 do not, given the challenge on constitution-al and procedural grounds involved in this case, provide a fair and complete description of the evidence below. The sentences should be supplemented by the following underlined language: "On the day of the hearing, October 4, 1988, the Gibsons' attorney met with them for the first time to prepare for the hearing at 8:30 a.m. in his office. The meeting in the attorney's office lasted approximately 10 minutes. Later, in the court's library, located approximately 40 feet from the courtroom, the Gibsons' counsel gave the Gibsons an inch and a half thick file he had received from the Department of Public Welfare. He

advised them that approximately 20 witnesses could testify against them and that there were some serious allegations. He told them that he was disadvantaged because he did not know who the witnesses were nor what they would say."

(d) The first sentence of the second full paragraph at 551 N.E.2d 883 should be amended to read: "The record does not show[] with any clarity that Michelle was advised of the rights and consequences enumerated under I.C. 31-6-5-3." This supplementation is based upon a comparison of the testimony of Michelle Gibson's former counsel and her own testimony at the hearing on the motion to correct errors which is set forth at pages 6 to 8 of Michelle

Gibson's appellant's brief.

(e) The foregoing corrections were presented to the Court of Appeals in Michelle Gibson's petition for rehearing.

WHEREFORE, natural mother-appellant Michelle Gibson respectfully requests the Court to grant transfer, reverse the trial court's judgment based upon the purported voluntary relinquishment of rights and remand for a hearing on the Department's pending petition to terminate parental rights. In the alternative, Michelle Gibson requests the Court to remand to Judge Stump so that all parties may settle the record insofar as the unreported proceedings on October 4, 1988 are concerned, if such settlement is possible.

Appendix G

Indiana Supreme Court's Order of October 3, 1990 Denying Transfer

GIBSON, MICHELLE -V- DEKALB CTY. DEPT. OF PUBLIC WELFARE

You are hereby notified that the Supreme Court has on this day 10/03/90 APPELLANT'S PETITION FOR TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE. ALL JUSTICES CONCUR.

APPENDIX H

Other Statutes and Rules

1. Ind.Code 31-6-5-4 (1988).
2. Ind.Tr.R. 59(H)(1988).
3. Ind.App.R. 7.2(A)(3)(c).
4. Ind.App.R. 7.2(C)(2).

1. In 1988, Ind. P.L. 177-1986, Sec. 2, Ind.Code 31-6-5-4, provided,

(a) A verified petition to terminate the parent-child relationship involving a delinquent child or a child in need of services may be signed and filed with the juvenile or probate court by:

(1) the attorney for the county department;

(2) the prosecutor;

(3) the child's court appointed special advocate; or

(4) the child's guardian ad litem.

(b) Upon the filing of a petition under this section, the attorney for the county department or the prosecutor shall represent the interests of the state in all subsequent proceedings on the petition. The probate court has concurrent original jurisdiction with the juvenile court in proceedings on the petition. The person filing the petition may request the court to set the petition for a hearing.

(c) the petition shall be entitled "In the Matter of the Termination of the Parent-Child Relationship of _____, a child, and _____, the child's parent (or parents)" and must allege that:

(1) the child has been removed from

the parent for at least six (6) months under a dispositional decree;

(2) there is a reasonable probability that:

(A) the conditions that resulted in the child's removal will not be remedied; or

(B) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(3) termination is in the best interests of the child; and

(4) there is a satisfactory plan for the care and treatment of the child.

2. Rule 59(H) of the Indiana Trial Rules of Procedure provided in 1988,

(H) Motion to correct error based on evidence outside the record.

(1) When a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion.

(2) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of

the moving party's affidavits and motion, in which to file opposing affidavits.

(3) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file its own motion to correct errors under this subdivision, and in which to assert relevant matters which relate to the kind of relief sought by the party first moving to correct error under this subdivision.

(4) No reply affidavits, motions, or other papers from the party first moving to correct errors are contemplated under this subdivision.

3. Rule 7.2(A)(3)(c) of the Indiana Rules of Appellate Procedure provides:

(A) **Definition.** The record of the proceedings shall consist of the following documents:

. . . .

(3) The transcript of the evidence and proceedings at trial.

. . . .

(c) Statement of the Evidence or Proceedings when no Report was

made or when the Transcript is Unavailable. If no report of all or part of the evidence or proceedings at the hearing or trial was or is being made, or if a transcript is unavailable, a party may prepare a statement of the evidence of proceedings from the best available means, including his recollection. If submitted contemporaneously with the matter complained of, the statement may be settled and approved by the trial court. If submitted thereafter, the statement shall be served on other parties who may serve objections or prepare amendments thereto within ten (10) days after service. The statement and any objections or prepared amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall become a part of the record and be included by the clerk of the trial court in the record.

If statements or conduct of the trial judge are in controversy, the statement shall be supported by sworn affidavit which shall be submitted to the trial judge for his certification. If he refuses to certify the statement he shall file opposing affidavits. All such affidavits shall be included in the record by the clerk of the trial court.

4. Rule 7.2(C)(2) of the Indiana

Rules of Appellate Procedure provides in relevant part:

> (C) **Correction or Modification of the Record.** If, on appeal, any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the trial court and the record made to conform to the truth. If anything material to either party is omitted from the record or is misstated therein, the trial court shall
>
> . . . .
>
> (2) upon the order of the court of appeal pursuant to the motion of a party or on its own initiative, correct the omission or misstatement and if necessary certify and transmit a supplemental record. Incompleteness or inadequacy of the record shall not constitute a ground for dismissal of the appeal or preclude review on the merits.
>
> Affidavits may be filed in support of a motion hereunder. The respective parties may file briefs but oral argument will not be heard.
>
> . . . .

(2)

No. 90-1077

In The

Supreme Court of the United States

October Term, 1990

MICHELLE STEPHENSON,

Petitioner,

v.

DEKALB COUNTY DEPARTMENT OF PUBLIC WELFARE,

Respondent.

Petition For A Writ Of Certiorari To The Indiana Court Of Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Before a court may accept a mother's out of court signature to a "voluntary relinquishment" of her relationship with her children, and thereby permanently terminate that relationship, must it hold a hearing to determine whether the mother's act was, in fact, voluntary?

2. Should the proceeding during which the court accepted the "voluntary relinquishment" (again in the mother's absence) be reported, if a reporter was available?

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No. 90-1077

In The

Supreme Court of the United States

October Term, 1990

MICHELLE STEPHENSON,

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v.

DEKALB COUNTY DEPARTMENT
OF PUBLIC WELFARE,

Respondent.

Petition For A Writ Of Certiorari
To The Indiana Court Of Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondent, DeKalb County Department of Public Welfare, respectfully requests that this Court deny the petition for writ of certiorari to review the judgment and opinion of the Indiana Court of Appeals, requested at 551 N.E.2d 881.

STATEMENT OF THE CASE

Without completely restating the facts of the case, we note there are numerous errors, misstatements, or incomplete statements by Michelle Stephenson in her petition for writ of certiorari that must be addressed. Stephenson alleges that her counsel told her they had only a 10% chance of winning (Pet. for Writ, p. 13) and while in her petition there is a cite to compare R. 658-59; *cf.*, R. 660, there is failure to affirmatively state that her counsel denied making such a statement at those cites.

The same can be said for the allegation that the parents would probably go to jail (Pet. for Writ, p. 14). This was also denied by Stephenson's counsel (R. 660-61). Michelle Stephenson also refers to a letter written by her counsel on the same day as the termination of parental rights. (Pet. for Writ, p. 23). Just prior to the quoted statement there are three paragraphs in the letter which give valuable insight into whether her consent was knowing and voluntary:

> As you are well aware, the DeKalb County Department of Public Welfare and it's (sic) attorney, Kirk D. Carpenter, were prepared to present testimony in support of their termination of your parental rights from 20 witnesses. Those witnesses involved welfare case workers, your neighbors, your employers, several landlords, police, etc. Most destructive of the evidence to be presented was to come from your former landlord, Mr. Witt, who was going to testify concerning his finding drug paraphernalia in your former residence. There was going to be testimony, generally, that the conditions that resulted in the placement of your children with the welfare department had not and would not

be remedied. Further, there was going to be testimony that the welfare department had offered to each of you reasonable services steeped in assisting you in fulfilling your parental obligations to your children which you either failed to accept or the services offered were ineffective in their goal. It was obvious that the welfare department had a planned and well organized scenario for presentation to the Honorable Harold D. Stump, Judge of the DeKalb Juvenile Court.

You people were very perceptive in your observations. You knew that you were running uphill, particularly, in view of the paraphernalia evidence of recent vintage coupled with the evidence of drug usage in you (sic) past. You made the hardest decision that parents could ever make. You voluntarily relinquished your parental rights to Michael Shane Stephenson, Benjamin Jeffery gibson (sic) and Christopher Charles Gibson to the DeKalb County (sic) of Pulic (sic) Welfare thereby ending any and all rights to your children. The Voluntary Relinquishment of Parental Rights were (sic) executed in my presence and I notarized it. Those documents were subsequently presented to the Judge of the DeKalb Juvenile Court and an entry issued reflecting your knowing and voluntary relinquishment of your children to the DeKalb County (sic) of Public Welfare.

You are being given the opportunity to visit with those children for a last time in the not-to-distant (sic) future. Those arrangements were made in the DeKalb County Courthouse library shortly after resolvment (sic) of the issues in this case. It is my understanding that the DeKalb County Department of Public Welfare wants a little time to climatize (sic) the children to this abrupt and permanent change and that they will be notifing (sic) you in the not-to-distant (sic)

> future as to the time and place this last visitation is to take place. Further, you will be given an opportunity to turn over all of the children's toys to them. Steps are being taken to, through a professional photographer, to (sic) provide you with a picture of all of the children. I want to be sure that all of those things are done. You are to notify me should you have any problems in accomplishing those ends. I am sure that you will be doing exactly that.

Petitioner alleges no one told her what her rights were (Pet. for Writ, p. 18), yet there are mentions in the record that she was informed of all of the rights required by statute. (I.C. 31-6-5-3; R. 271-6; R. 677-8).

Stephenson also alleges that nothing in the record refers to or suggests what occurred when the Voluntary Relinquishment of Parental Rights forms were presented to the Court (Pet. for Writ, p. 19). However, the Petitioner correctly quotes from the trial Court's judgment on the very next page of the petition:

> . . . that said parents were notified of their constitutional and other legal rights and of the consequences of their actions under section 3 of I.C. 31-6-5-3; that there is no evidence of fraud or duress to induce said parents to execute said voluntary relinquishment of their parental rights and that said parents are competent to give their consent to the termination of such parent/child relationship. (R. 277).

Finally, Ms. Stephenson's statement of the case fails to point out that the conferences with her attorney and other discussions and occurrences on the day of the termination hearing took all morning, as she admitted during the hearing on the Motion to Correct Errors. (R. 705).

ARGUMENT

I.

STEPHENSON'S PETITION SHOULD BE DENIED BECAUSE THIS COURT DOES NOT RENDER OPINIONS WHICH ARE BASED ON IMPROPERLY PRESENTED FEDERAL QUESTIONS

The questions Stephenson petitions this Court to address were never presented to the Indiana state courts. The first question presented to this court, "Before a court may accept a mother's out of court signature to a 'voluntary relinquishment' of her relationship with her children, and thereby permanently terminate that relationship, must it hold a hearing to determine whether the mother's act was, in fact, voluntary?" was never properly presented to trial court during the (then required) motion to correct errors stage of the case. The only constitutional issue raised in the Motion to Correct Errors was whether she had to be informed of her rights pursuant to statute before she could execute the "voluntary relinquishment" (R. 286). Now she seeks to alter that inquiry. The second question presented by Stephenson, "Should the proceeding during which the court accepted the 'voluntary relinquishment' (again in the mother's absence) be reported, if a reporter was available?" was never even mentioned prior to the Petition for Transfer to the Indiana Supreme Court (R. 286-288; Appellant's Brief to the Indiana Court of Appeals p. 1). Therefore, she argues issues never presented to the trial court or the Indiana Court of Appeals. The Indiana Supreme Court did not pass on the question now argued and transfer was denied.

If a state supreme court gives no opinion and the judgment may have rested on a nonfederal ground, this Court will not take jurisdiction. *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). The Indiana Supreme Court will only consider constitutional questions which are first raised in the trial court. *City of Indianapolis v. Wynn*, 239 Ind. 567, 582, 159 N.E.2d 572, 573 (1959). Although Stephenson may have urged her questions before the Indiana Supreme Court, they were not properly presented to the court. As in *Stembridge*, the Indiana Supreme Court did not and could not decide the questions which Michelle Stephenson has presented in her petition for writ of certiorari. Therefore, Stephenson like the petitioner in *Stembridge*, has not presented questions which are acceptable to this Court.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE RECORD IS CLEAR THE TERMINATION WAS KNOWING AND VOLUNTARY

The Indiana Court of Appeals found that Stephenson's consent was voluntary and executed without duress. (Pet. for Writ App. D, pp. 13D-14D). The trial court found that she was notified of her constitutional and other legal rights and of the consequences of her action and that there was no evidence of fraud or duress. (R. 277).

Stephenson admits that this is a fact-bound case. Throughout her statement of the case she urges this Court to adopt her construction of the facts even though they are contrary to those found by the trial court and the Indiana Court of Appeals. The record in this appeal,

which did not go to a contested trial, is 742 pages, not counting appellate briefs, appellate decisions, or appellate petitions. The 742 pages relate to the facts that lead directly to the appeal.

The record is clear. From the trial court, to the Indiana Court of Appeals, to the Indiana Supreme Court there has been no finding that the termination was not knowingly, voluntarily, and freely given. Stephenson's appeal to this Court as well as prior appeals amount to nothing more than a change of mind.

CONCLUSION

Wherefore, Respondent respectfully prays that this Court deny Michelle Stephenson's petition for writ of certiorari to the Indiana Court of Appeals.

Respectfully submitted,

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